

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

FILED BY CLERK

DEC 13 2007

COURT OF APPEALS  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Respondent,	)	2 CA-CR 2007-0169-PR
	)	DEPARTMENT B
v.	)	
	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
BARAMI YELVERTON,	)	Rule 111, Rules of
	)	the Supreme Court
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20054891

Honorable Ted B. Borek, Judge

REVIEW GRANTED; RELIEF DENIED

Robert J. Hooker, Pima County Public Defender  
By Frank P. Leto

Tucson  
Attorneys for Petitioner

V Á S Q U E Z, Judge.

¶1 Petitioner Barami Yelverton challenges the trial court's denial of her petition for post-conviction relief. Although we grant review, we deny relief.

¶2 After having been charged with two counts of possession of a narcotic drug for sale and one count of possession of drug paraphernalia, Yelverton pled guilty to a single

count of attempted possession of a narcotic drug for sale and admitted having a prior felony conviction for possession of a narcotic drug in Pima County cause number CR-20043914. The plea agreement specified a sentencing range from a substantially mitigated term of imprisonment of 3.5 years to an aggravated term of thirteen years and provided that Yelverton “shall receive no more than the aggravated sentence in the Department of Correction[s].” The trial court sentenced her to a partially aggravated, nine-year term, to be served concurrently with her sentences in CR-20043914 and CR-20051098.<sup>1</sup>

¶3 Yelverton filed an of-right petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., claiming her sentence was “excessive” because the “mitigating circumstances outweighed the aggravating circumstances.” She asked the trial court to reduce her sentence to a mitigated term of five years or, alternatively, to “a presumptive sentence if the court [found] the aggravation and mitigation balance each other.”

¶4 The trial court summarily dismissed the petition, finding there was “no issue of material fact that would require an evidentiary hearing” and that Yelverton’s “claim of excessive sentence . . . [was] precluded under the facts of this case” because her sentence was “less than [the] agreed maximum aggravated sentence of 13 years.” The court further found that Yelverton had raised no mitigating factors the court had not already properly

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<sup>1</sup>Yelverton had been on probation for her convictions in CR-20043914 and CR-20051098 when she committed the instant offense. Following the revocation of her probation in those cases, the trial court sentenced Yelverton to presumptive, concurrent prison terms of one and five years respectively on those convictions.

considered, noting that the information had been “before the Court and therefore within matters considered.”

¶5 In her petition for review, Yelverton asks this court to “exercise it’s (sic) authority under [A.R.S. §] 13-4037 and reduce [her] sentence.” She also argues the trial court abused its discretion in denying relief because the court made “findings not supported by the record and err[ed] as a matter of law” in finding her claim was “precluded.”

¶6 Initially, we note that § 13-4037(B) authorizes an appellate court to reduce an excessive sentence “[u]pon an appeal from the judgment or from the sentence.” It does not authorize the reduction of a sentence upon review of the denial of post-conviction relief. However, Yelverton’s claim that her sentence is excessive is cognizable under Rule 32. *See State v. Cazares*, 205 Ariz. 425, ¶ 4, 72 P.3d 355, 356 (App. 2003). We “review a trial court’s denial of post-conviction relief for an abuse of discretion.” *State v. Decenzo*, 199 Ariz. 355, ¶ 2, 18 P.3d 149, 150 (App. 2001). We find none here.

¶7 “A trial court has broad discretion to determine the appropriate penalty to impose upon conviction, and we will not disturb a sentence that is within statutory limits . . . unless it clearly appears that the court abused its discretion.” *Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d at 357. A trial court abuses its discretion only when it acts “arbitrarily or capriciously or fail[s] to adequately investigate the facts relevant to sentencing.” *Id.* The trial court did not do that here. The court considered the same factors in evaluating Yelverton’s petition for post-conviction relief as it did at her sentencing and came to the

same conclusion. Yelverton's sentence is within the range to which she agreed she could be sentenced. That fact alone is sufficient to distinguish Yelverton's case from *State v. Waldrip*, 111 Ariz. 516, 533 P.2d 1151 (1975), and *State v. Kovacevich*, 26 Ariz. App. 216, 547 P.2d 487 (1976), on which she relies.

¶8 Yelverton argues the trial court erred as a matter of law because it stated her claim for post-conviction relief was "precluded under the facts." Although the trial court's wording was imprecise as Yelverton had not filed a previous Rule 32 petition, the imprecision does not amount to legal error here. In context, we interpret the trial court's ruling to mean it found Yelverton's claim without merit rather than technically "precluded" within the meaning of Rule 32.2(a).

¶9 Yelverton argues the trial court erred in its factual findings in stating Yelverton's counsel had failed to cite properly to the record in the memorandum supporting the petition for post-conviction relief and in accusing counsel of misleading the court about Yelverton's criminal history. Even if the trial court's statements could be considered findings of fact, they were not bases for its ruling, and we do not address their accuracy.

¶10 Finally, Yelverton contends the trial court incorrectly interpreted defense counsel's statements at sentencing to mean Yelverton had "conceded the aggravator of pecuniary gain and . . . admitted selling cocaine for five years before." The trial court actually stated in its post-conviction ruling that Yelverton had "overlook[ed] that her trial defense counsel agreed to the possible aggravator of pecuniary gain" and that, "[a]ccording

to the presentence report, petitioner [had] admitted she had sold drugs for over five years.” The presentence report in fact stated that Yelverton had “told a T[ucson] P[olice] D[eartment] detective that she [had] sold cocaine for over five years,” and counsel had stated at sentencing: “Technically you could argue that it was for pecuniary gain. The Court can see from the facts of the case what’s going on[,] like six different people, whoever can get the crack distributes it to the other six people. They can all sit around and use it.” In short, there was no misinterpretation.

¶11 Although we grant review, we deny relief.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge